File: 166-2-27426

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

ELOI LÉVESQUE

Grievor

and

TREASURY BOARD

(Fisheries and Oceans: Canadian Coast Guard)

Employer

Before: Marguerite-Marie Galipeau, Deputy Chairperson

For the Grievor: David Jewitt, counsel, Canadian Merchant Service Guild

For the Employer: Agnès Lévesque, counsel

Heard at OTTAWA, Ontario,
April 22, 1997

This decision follows the hearing of a grievance referred to adjudication by Eloi Lévesque employed as a Ships' Officer (SO-MAO-05) with the Canadian Coast Guard.

The grievor alleges that the employer has unilaterally altered his working conditions and thus, is in contravention of clause 25.01 of the Ships' Officers collective agreement (Exhibit A-1) which has been concluded by the Canadian Merchant Service Guild and Treasury Board (Expiry date: March 31, 1994 and extended since then, by legislation).

His grievance reads as follows:

> *My quarters have not been maintained daily since June 28, 1995, although I have not been advised of that fact. The employer has no right to unilaterally change my working conditions.* (translation)

He is requesting the following corrective action:

> *I am asking that, as an officer, the maintenance of my quarters be resumed as before, that is that it be done every day.* (translation)

Clause 25.01 reads as follows:

> *Article 25*
>
> *Meals and Quarters*
>
> ***25.01*** *When an officer is working on a vessel which is equipped with a galley and quarters, the officer shall be entitled to receive meals and quarters except as otherwise provided in clause 25.02.*

On January 19, 1996, the employer issued a circular (Exhibit A-3) which stated, inter alia:

> *2. General*
>
> *Each person aboard, without exception, must personally ensure an appropriate level of cleanliness and tidiness in his or her cabin, in accordance with the established requirements for CCG ships. Each person must pick-up his or her meals at a cafeteria-style counter. As new ships are constructed or older ships are remodeled, all food service*

> *operations shall be placed in one area so that officers and crew members will share the same facility.*

On March 27, 1996, the employer has agreed (Exhibit A-3, tab 5) that one grievance "from the original group from Laurentian Region, be taken as the representative grievance and the end result be applied to all Ships' officers across the country".

At the hearing, both counsel made the following opening statements.

Counsel for the grievor stated that this circular (Exhibit A-3) issued by the employer in January 1996 altered the working conditions of ships' officers as embodied in clause 25.01 of the collective agreement as well as in the employer's past practice under this clause and in the employer's own representations at the bargaining table during the round of collective bargaining which preceded the conclusion of the collective agreement (Exhibit A-1) at issue.

Counsel for the grievor explained that class A and B vessels do not have galleys and quarters but that class C and above vessels have galleys and quarters and that the evidence would show that ships' officers on class C and above vessels have, since the inception of collective bargaining, always had their meals prepared and served to them and their quarters maintained, all pursuant to the language in clause 25.01 which has remained unchanged for as long as anyone could remember.

Counsel also stated that the evidence would show that during the last round of negotiations [in 1990-91], the bargaining agent became aware of rumors that there would be alterations to the manner in which meals were provided and quarters were maintained and, as a result, made a proposal ("proposal 22": Exhibits A-4 and A-5) to ensure the continuance of the existing working conditions as they related to meals and quarters.

Counsel for the grievor also stated that the evidence would show that during the course of the negotiations and at the time the bargaining agent's proposal was discussed, Treasury Board representatives assured the Guild that there would not be any change in the existing practice and that clause 21.05 would continue to be applied as it had always been applied. The evidence would further show that on the basis of that representation during negotiations, the bargaining agent withdrew its proposal

and that in fact, from the time of the ratification of the collective agreement until five years later, in January of 1996 when the circular was issued, meals continued to be prepared and served to officers and their quarters continued to be maintained.

Counsel for the grievor summarized the grievor's position as follows: clause 25.01 of the collective agreement as it has always been interpreted, has been breached; in view of its own representations during negotiations and on the basis of its own past practice, the employer is estopped from altering or changing the delivery of meals or the maintenance of ships' officers quarters.

Counsel for the grievor also stated that although, as pointed out by counsel for the employer, meals were not mentioned in the grievance or the answers to the grievance, they too were part of the grievance. He explained that the issue was the directive as contained in the employer's circular (Exhibit A-3, tab 1) and that both meals and quarters were affected as a result of the issuance of this directive and that the bargaining agent did not wish to have to come back before the Board with other grievances dealing with the meals since the effect of the directive was the same whether it was applied to meals or quarters.

For her part, counsel for the employer stated that certain vessels which have galleys and quarters did not offer prepared meals and maintained quarters prior to the issuance of the circular (Exhibit A-3, tab 1) and still do not have prepared meals or maintained quarters. (Counsel for the grievor agreed with this and indicated that the bargaining agent was seeking to preserve the situation as it had existed by agreement of the parties prior to the issuance of the circular and that it was not seeking to enlarge its rights.)

Counsel for the employer also stated that the evidence would show that the bargaining agent had made proposal 22 (Exhibit A-5) but that the employer had declined this proposal because it did not want to modify clause 25.01 which accommodated the differences between vessels.

Counsel for the employer stated that because some vessels are too small, others do not have the staff, others are simply used for a day trip while others are at sea for twenty consecutive days, it would have been illogical for the employer to acquiesce to the words "prepared meals" and "maintained quarters" as were proposed by the

bargaining agent in its proposal 22 (Exhibit A-5), and which would have become an obligation which the employer could not have met.

Counsel for the employer further stated that it is only the words "meals" and "quarters" which are used in the collective agreement and that the employer is not bound to provide anything more on the basis of the fact that it has exceeded its obligation in the past.

Counsel for the employer also stated that the evidence would show that the employer had given notice that the maintenance of quarters and the preparation of meals would change, that it was the employer's right to effect this change and that the doctrine of estoppel did not apply in this case.

She also stated that the reasons for implementing these changes were cost-related. She added that it was the intent of the employer to implement its circular (Exhibit A-3, tab 1) over a three-year period and that this explained why there were (at the time of the hearing) variations in the application of the circular.

Counsel for the employer stated that, although crew and officers ate the same food, that is, benefited from the same choices of food, the distinction between the groups resided in the fact that each group received a different service. The point of the directive, according to counsel for the employer, is to have the provision of meals done in the style of a cafeteria for ships' officers as well as crew.

Counsel for the employer concluded by saying that the evidence would show that there had not been a breach of the collective agreement, nor had promises relating to meals and quarters been made during negotiations.

EVIDENCE

At the request of counsel for the employer, witnesses were excluded.

The facts as they relate to the grievor can be put simply. As a result of an interim coast guard fleet order issued in July 1995, the employer ceased to maintain fully and daily the grievor's quarters. This order was followed by another coast guard fleet order no. 444.00 (Exhibit A-3) in January 1996, the relevant part of which is reproduced at the beginning of this decision.

The exact date at which the daily maintenance of the quarters ceased is unclear. According to the grievance it was June 28, 1995; according to an annex to the grievance, it was December, 1995.

The grievor produced two witnesses. Their evidence can be summarized as follows.

Kenneth William Herbert has been employed by the Canadian Merchant Service Guild ("the Guild") since 1983. At the present time, he is Assistant to the Secretary-Treasurer. Prior to 1992, he was business agent for the Guild. Part of his duties involved negotiating on behalf of the western branch of the Guild. In 1985, he became Chairman of the National Negotiating Committee. In particular, he has participated in negotiations with Treasury Board on behalf of the federal government's ships' officers in 1990-91.

As Chairman of the Negotiating Committee, he compiled proposals for the Western Region, participated as an observer for the Eastern Region, and oversaw the collating of proposals at the national level. He prepared the presentation of the proposals and scheduled the negotiation meetings with Treasury Board representatives. During negotiations, as Chairman, he led the negotiations on behalf of the Guild. He was the spokesperson designated by the Committee. After the negotiations were concluded, he prepared a circular to the membership detailing all of the changes that were agreed to in the memorandum of agreement. He attended a series of meetings across the country to answer members' questions with respect to the conclusion of negotiations.

Proposal 22 (Exhibit A-5) was part of the Guild's proposals (Exhibit A-5) during the last round of negotiations. It reads as follows:

> *Proposal No. - 22 -*
>
> *AMEND TO READ: -*
>
> *25.01 When an Officer is working on a vessel which is equipped with a galley and quarters, he shall be entilted to receive prepared meals and have quarters maintained, except as otherwise provided in Clause 25.02.*
>
> *July 1990*

The context in which this proposal was withdrawn during negotiations was, according to Mr. Herbert, as follows.

Firstly, clause 25.01 of the collective agreement has had the present wording since the very first collective agreement in 1969-70.

This is how it was applied.

In vessels class C and above, where there were stewards, officers were served meals which they selected from a menu and officers also had their cabins maintained on a daily basis. On smaller vessels, because of the physical size of the vessel and the number of people on board, officers maintained their own quarters and their meals were prepared by unlicensed personnel or ships' crew.

The practice on class C and above vessels existed even prior to the advent of collective bargaining. According to Mr. Herbert, ever since the Canadian government has been operating vessels, officers have had their meals served by ships' crew and they have had their quarters maintained, that is, their bunks were made, their washrooms were cleaned and the floor was vacuumed and mopped on a daily basis. This practice was consistent throughout the country. This practice is considered by ships' officers as an historical right.

From the time he began as a business agent in 1983, Mr. Herbert was told by his members that one of the benefits of being an officer is that officers' quarters are maintained and their meals are served to them. This practice was a distinguishing feature between licensed officers and unlicensed crew members.

Mr. Herbert produced a chart (Exhibit A-6) of the vessels of each region depicting the situation on the vessels before and after the employer's circular was issued.

Mr. Herbert pointed out that although the practice existed on class C and above vessels, there were three vessels in the Laurentian Region (EP LE QUÉBÉCOIS, LOUISBOURG, CALANUS II) where the practice did not exist before the issuance of the circular (Exhibit A-3). As for the rest of the class C and above vessels in the Laurentian Region, the practice had existed aboard those vessels for as long as the vessels existed.

The practice existed in the Central Region and the Pacific Region as well as the Newfoundland Region and Maritimes Region. In the Pacific Region and the Newfoundland Region, the employer has not begun implementing the directive issued in its circular of 1996 and has begun a partial implementation in the Maritime Region on the ALFRED NEEDLER.

Mr. Herbert corrected the chart of the Newfoundland Region in relation to the vessels "HARP" and "HOOD". There are no stewards on these vessels. The cook and dockhand prepare the meals and maintain the cabins.

He also made corrections to the Central Region: the NAMO is a class C vessel, the NAHIDICK, class D. The ECKALOO, the DUMIT and the TEMBAH are class C and above vessels.

In summary, the practice of serving prepared meals and maintaining quarters has been applied to approximately 76.3 % of the Guild membership.

The practice existed contemporaneously with the language which can be found in clause 25.01 of the collective agreement and which has been the same in successive collective agreements.

In 1990-91, two incidents occurred that prompted the bargaining agent to table proposal 22 at the bargaining table: in one incident, officers on the West Coast did not have their meals prepared; in another incident, some managers at the National level hinted that they would discontinue the practice of maintaining quarters.

In order to preserve the practice that had always existed, the bargaining agent introduced proposal 22 with a view to maintaining the status quo. The wording of proposal 22 (Exhibit A-5) simply reflected the practice that had always existed. The position of the Negotiating Committee was not to make a gain but rather to maintain what the officers had had for as long as they had worked. It was a status quo proposal.

Prior to the negotiations, it had only been suggested once by the employer that clause 25.01 did not mean that officers' meals were prepared and their quarters maintained. This was during a national strike of ships' crews. During the strike, the steward of the MARTHA L. BLACK was a term employee, he did not participate in the strike. His term came to an end during the strike and the employer did not renew it.

Officers were left on their own and were told that they had access to the galley and to the refrigerators and could help themselves. They filed grievances which were upheld at adjudication.

Other than this incident, the employer never suggested that clause 25.01 did not mean prepared meals and maintained quarters on class C and above vessels.

During negotiations, when the bargaining agent presented proposal 22 (Exhibit A-5), the Treasury Board negotiator, Tony Boettger, was quite concerned because he felt that the effect of this proposal would be to require the employing departments to add people to the vessels. He pointed out that there were a number of vessels that didn't have maintained quarters because there was no steward and that, on certain vessels, meals were prepared but not served. He felt that the bargaining agent's proposal would require that meals be prepared and quarters be maintained for that 24 % of the bargaining agent's membership which to that date had not been getting those services. The bargaining agent's negotiator, Mr. Herbert, assured the employer's negotiator that the bargaining agent was not looking for additional services for that 24 % of its members and it was not seeking the addition of personnel. Rather, its intent was simply to protect these services which were already being provided.

In another discussion, the Treasury Board negotiator, Tony Boettger, took the position that Treasury Board did not intend to change any service currently provided. Mr. Herbert recollects that Tony Boettger made representations to the effect that the employer did not have the intent of changing anything regarding the services already being provided. He said that the department would not reduce any of the services during the life of the collective agreement. After a break, the bargaining agent returned and on the basis of the assurances it was given, withdrew proposal 22 (Exhibit A-5) from the bargaining table. According to Mr. Herbert, the understanding was that clause 25.01 would be applied as it always had been in the past.

This question was canvassed regularly at different union meetings throughout the country. The members of the bargaining agent's Negotiating Committee explained to the bargaining agent's members that proposal 22 was withdrawn because of assurances that there would be no changes to the existing situation.

Mr. Herbert added that the Treasury Board negotiators were emphatic that it was not the employer's intent to reduce the services and thus, that there was no need to change the language in clause 25.01. Hence, the bargaining agent withdrew its proposal 22 (Exhibit A-5). Had proposal 22 not been withdrawn, it would eventually have found itself in the mediation-binding arbitration resolution process.

From the conclusion of negotiations in 1991 to the issuance of the circular (Exhibit A-3, tab 1) in January, 1996, clause 25.01 was applied exactly as it had been applied in the previous twenty-five years.

The evidence of the bargaining agent's second witness can be summarized as follows.

John Love joined the Coast Guard in 1982, graduated in 1985 and has been a Fleet Officer since then.

He attended the 1990-91 negotiations and was part of the bargaining agent's Negotiating Committee.

His evidence is that prior to 1990-91, meals were served and quarters were maintained by stewards on the ships on which he served.

His evidence corroborates that of Kenneth William Herbert.

The Canadian Merchant Guild ("the Guild") presented proposal 22 (Exhibit A-5) as a result of having heard rumors of cut backs and the reduction of stewards. The Guild withdrew its proposal after the employer through its negotiator, Tony Boettger, assured the bargaining agent's Negotiating Committee that there was no need to amend the collective agreement and that it did not intend to change cabin service or to remove stewards. The bargaining agent relied on these assurances and, as a result, abandoned its proposal.

After the completion of the 1991 negotiations and the ratification of the collective agreement, the practice continued until 1996, that is, meals were served, quarters were maintained and clause 25.01 continued to be applied as it had been applied in the past.

Then, the employer's circular (Exhibit A-3, tab 1) was issued in 1996 and on the vessel, the GRIFFON, where John Love served, a steward was removed and cabins were no longer maintained.

The employer's evidence can be summarized as follows.

Yves Villemaire, Director of Staff Management at the Canadian Coast Guard, was Chief of Seagoing Personnel for the Coast Guard, in 1990-91.

During the 1990-91 negotiations, he was a member of the employer's bargaining team and he represented the Canadian Coast Guard.

When presented with proposal 22 (Exhibit A-5) the employer's position was that the existing language was appropriate. The employer felt that proposal 22 was unacceptable because it believed that, had it been agreed to, "there would have been person-year implications". According to Mr. Villemaire, the bargaining agent wanted to have proposal 22 inserted in the collective agreement to avoid situations such as that which happened during the ships' crews' strike when meals were not prepared and officers were told to help themselves to the contents of the refrigerator. The bargaining agent felt that having access to a frozen steak was not a meal. Mr. Villemaire does not recall specifically if the maintenance of cabins was discussed.

Mr. Villemaire does not remember at what point the bargaining agent dropped proposal 22 or the reasons for this. During examination, Mr. Villemaire stated that he did not recall that the negotiator of Treasury Board promised to keep the status quo.

In cross-examination, Mr. Villemaire acknowledged that at the time of the 1990-91 negotiations, Treasury Board had no plan to change its operations. He also acknowledged that it was possible that Treasury Board's negotiator, Tony Boettger, had said that the employer did not intend to alter meals and services. He also repeated that, at the time, it was not the employer's intent "to take away something on meals and services" and that, had it been the intent, the employer would have so advised the bargaining agent.

The evidence of the employer's last witness can be summarized as follows.

Tony Boettger was Chief Negotiator on Treasury Board's negotiating team during the 1990-91 negotiations. Mr. Boettger recalls vaguely the discussions surrounding the bargaining agent's proposal 22 (Exhibit A-5). He recalls that the employer's point of view at the time was that proposal 22 would have represented problems for the employer in that, according to the employer, it would have entailed a guarantee of maintenance of services and a guarantee of jobs in another unit. Also, there arose an issue of equity amongst vessels.

His recollection is that the bargaining agent was concerned about its officers having had to cook meals during a ships' crews' strike and having to take care of the maintenance of their quarters.

Tony Boettger did not recall making a commitment in relation to proposal 22. He thinks a commitment in relation to operations would have been made in writing from someone from the department.

Tony Boettger did not know the period of time, prior to 1996, during which cabins were maintained. When asked if it was the employer's intent, at the time of negotiations, to change services, he replied that he had no recollection of that.

In cross-examination, Tony Boettger stated that at the time of negotiations it was not the intention of Treasury Board to change clause 25.01 of the collective agreement.

He also stated that he knew that it was part of crews' functions to prepare meals and maintain quarters. At the time of negotiations, departmental representatives who advised him on this subject were more familiar than he was on the details of the practice which existed at the time. For his part, he couldn't testify on the length of time during which the practice was in place and on the time during which the present language had been in successive collective agreements.

Tony Boettger confirmed Yves Villemaire's testimony that there were no plans at the time of negotiations to make any operational changes under clause 25.01 of the collective agreement. He added that he would have advised the bargaining agent if there had been such plans.

Tony Boettger also stated that he did not have independent recollection on whether proposal 22 (Exhibit A-5) was discussed or not.

ARGUMENTS

The argument of counsel for the grievor can be summarized as follows.

Clause 25.01 requires that officers be served prepared meals and have their quarters maintained on the basis of past practice. There is uncontradicted evidence of a past practice. Even the negotiations in 1991 did not alter the past practice which was only altered in 1996.

It can be said that the language in clause 25.01 is ambiguous and thus, recourse can be had to past practice. It can also be said that on the basis of the uninterrupted practice which has existed under clause 25.01, the employer is estopped from altering unilaterally this practice. It can also be said that the employer is estopped from altering the practice on the basis of the representations it made during negotiations and which brought about the withdrawal of proposal 22 (Exhibit A-5).

In addition, the words "to receive" in clause 25.01 are ambiguous and thus allow resort to past practice. A "galley" is a kitchen where meals are prepared. Generally, a vessel with "galley and quarters" is a class C vessel. The words "normally provided" in clauses 25.02 and 25.03 are invitations to consider the norm, that is, the practice.

The following cases dealing with latent ambiguity and past practice as well as resort to negotiating history, were quoted: Re: Commissioner of Northwest Territories and Northwest Territories Public Service Association 24 L.A.C. (3d) 132, Re: Motor Transport Industrial Relations Bureau of Ontario and General Truck Drivers' Union, Local 938 2 L.A.C. (2d) 206, Re: United Steelworkers, Local 3129, and Moffats Ltd. 22 L.A.C. 56, Re: Teamsters Union and Motor Transport Industrial Relations Bureau of Ontario 22 L.A.C. 57, Re: Hermes Electronics Ltd and International Brotherhood of Electrical Workers, Local 1651, 14 L.A.C. (4th) 289, Re: Sherwood Co-operative Association Ltd. and Retail, Wholesale & Department Store Union, Local 539 49 L.A.C. (4th) 418, Re: British Columbia Nurses' Union and Communications, Energy and Paperworkers Union of Canada, Local 444, 49 L.A.C. (4th) 374, Re: British Columbia

Teachers' Federation and British Columbia Teachers' Federation Administrative Staff Union 47 L.A.C. (4th) 221.

The language in clause 25.01 and the past practice under clause 25.01 demonstrate a consistent intent to provide prepared meals and maintain quarters. There has been no re-negotiation of either. There was no intention to remove the entitlements and the intent was to maintain the status quo. According to Yves Villemaire, if the intent had been otherwise, the employer would have advised the bargaining agent. The withdrawal of its proposal 22 (Exhibit A-5) by the bargaining agent confirms the intent of the parties to maintain the status quo i.e. that meals be prepared and quarters maintained. It should be noted that Yves Villemaire agreed that the "status quo" meant prepared meals and maintained quarters. Before withdrawing proposal 22 (Exhibit A-5), the bargaining agent sought and obtained the assurance that the status quo would be maintained. The bargaining agent would not have backed off if assurances had not been given and proposal 22 would eventually have been sent to mediation.

The lengthy practice under clause 25.01 is evidence of the intent of the parties. There existed agreement on the meaning of clause 25.01.

The practice and the representations are a shield on which the bargaining agent relies. It should be noted that even after the 1991 negotiations, the practice did not change for five years. Finally, it should be remembered that whether estoppel works for or against the bargaining agent, it continues until the parties re-negotiate.

The following decisions were also relied upon: James C. MacDonald, Robert J. Bélanger and Richard Douillette and Treasury Board, Board files 166-2-26406, 166-2-26435 and 166-2-26440; Luc Deniger and William Jones Miller and Treasury Board, Board files 166-2-21583 and 166-2-21584; Harold Dore, et al, and Treasury Board, Board files 166-2-15053 to 15056; Re: Metropolitan Toronto Zoo and Canadian Union of Public Employees, Local 1600 47 L.A.C. (4th) 336; Re: Government of Province of Manitoba and Manitoba Government Employees' Union 34 L.A.C. (4th) 116; Re: Ferraro's Ltd. and United Food & Commercial Workers, Local 1518 7 L.A.C. (4th) 220; Re: Dow Chemical Canada Inc. and Energy and Chemical Workers Union, Local 672 7 L.A.C. (3d) 385; Re: Fernie District Hospital and British Columbia Nurses' Union

18 L.A.C. (4th) 140; Re: Board of Commissioners of Police for the Township of Innisfil and Township of Innisfil Police Association 19 L.A.C. (3d) 263; Re: Southam Murray Printing (Council of Printing Industries of Canada) and Toronto Typographical Union, Local 91 24 L.A.C. (3d) 76.

On the issue of remedy, counsel for the bargaining agent made the representations that follow.

It should be noted that the grievor is not seeking a monetary remedy but rather the reinstatement of a working condition. Consideration should be given to extending the practice. It has existed since time immemorial. At this point in time, the employer has taken away a bargaining advantage. On the basis of the estoppel alone, the order ought to continue the practice for the length of time it was illegally removed and into the next round of collective bargaining and into the next collective agreement. It is not sufficient to say that there was a breach of the collective agreement. The parties are entering negotiations, and by the employer's own actions, the status quo has been changed since the introduction of the circular. It is not proper to leave the bargaining agent in that position. The order has to address the situation of equity. Therefore, the practice ought to be maintained for the entire length of the next collective agreement. The practice should not be removed until the expiry of the next collective agreement which will be negotiated. The employer has achieved an advantage by removing the practice. It would be inequitable to put the bargaining agent in the position of having to re-negotiate something back into the collective agreement. The negotiating onus should be on the employer to come to the bargaining agent with a proposal on an amendment to the collective agreement.

It is open to the Board to order the length of time for which the estoppel will last. The norm is until the next round of negotiations but in the present case, it is an extraordinary situation and the estoppel should continue until after the next round of collective bargaining.

There was a practice and there were representations made during the last round of bargaining. Had it not been for the assurances given by the employer, the bargaining agent might have obtained, through mediation, the language it wanted.

It is asked that the adjudicator declare that by issuing the circular (Exhibit A-3, tab 1) the employer has breached clause 25.01 of the collective agreement and that it order the reinstatement of prepared meals and maintained quarters where they have normally been provided and further direct that all officers who have been adversely affected be compensated pursuant to clause 25.02 (which is the most logical compensation). In the alternative and with respect to estoppel, it is sought that the adjudicator declare that the employer is estopped from issuing a directive or altering the practice of providing prepared meals and of maintaining quarters till the expiry of the subsequent collective agreement which will commence on April 1, 1998.

Finally, it should be emphasized that the bargaining agent is only seeking the enforcement of the practice where it was normally provided.

The representations by counsel for the employer can be summarized as follows.

Clause 25.01 does not say maintained quarters or prepared meals. December 1989 was the first time the employer needed to use the flexibility provided by clause 25.01. During negotiations, the employer did not want to have in the collective agreement language that would limit the flexibility which it had under clause 25.01 as drafted and as enforced prior and now. However, it could not make a promise that things would not change. During the 1991 negotiations, assurances were not given that the employer would not change its practice. Yves Villemaire testified that the intent was to maintain the status quo.

It should be noted that on certain vessels, there were no prepared meals or maintained quarters.

The collective agreement is clear. The words of proposal 22 (Exhibit A-5) were not incorporated. Some vessels [class C and D] do not have maintained quarters or served meals. There does not exist a uniform practice. If the employer had incorporated it, the employer would not be able to meet this obligation where there are vessels without sufficient staff to serve meals or maintain quarters.

As for the argument that there exists an estoppel, where is the detrimental reliance? At the time of negotiations, what was important to the bargaining agent was whether a meal had to be prepared by an officer or not. No prejudice has been caused

by the introduction of the new directive. One should consider that an officer can be on a ship for one year, a ship on which the practice does not exist and he may be for the next year on a ship where the practice does exist. There should not be different treatment for employees of the same category. The directive contained in the circular (Exhibit A-3, tab 1) has been implemented for cost reasons. Prior to that, not all officers enjoyed the benefit. The grievance should be dismissed.

If it is upheld, it should be limited to the end of this collective agreement.

The following cases were quoted: The Queen in Right of Canada as represented by the Treasury Board, Transport Canada, J.P. Little and R.G. Bell [1984] 1 F.C. 1081, The Queen v. Benoit Charland et al. [1982] 1 F.C. 455, Richard Légaré and Treasury Board, Board file 166-2-15018, Reclamation Systems Inc. v. The Honourable Bob Ray et al 27 O.R. (3d) 419.

Counsel for the grievors reiterated that the evidence was clear that the employer had given assurances that it did not intend to change the practice and that it was on this basis that the bargaining agent withdrew its proposal. In short, the bargaining agent relied on the practice which existed throughout the collective agreement as well as on the express assurances it was given during negotiations.

DECISION

This grievance is granted for the reasons that follow.

The words "meals" and "quarters" used in clause 25.01 contain a latent ambiguity when applied in the present context and this ambiguity allows me to consider the practice. This ambiguity has had the merit of giving "flexibility" to the employer, to use an expression used by counsel for the employer, with regard to certain vessels. However, this latent ambiguity has also allowed the existence of a practice throughout successive collective agreements with regard to most class C and above vessels, to serve meals and maintain quarters.

On the basis of the evidence, I am satisfied that on those vessels set out in Exhibit A-6 (with the agreed to corrections and exceptions) the practice was that

officers' meals were served to them and their quarters were maintained daily. This practice was consistent on a majority of class C and above vessels. Approximately 76% of the Guild membership enjoyed the benefits that resulted from this practice.

Although the practice did not apply to all vessels, it consistently applied to a number of vessels on which both parties agree. It should be noted that the existence of this practice has not been denied by the employer's witnesses. In addition, it should be noted that the employer has admitted in its answer to the grievor at the first level of the grievance procedure, that the grievor's conditions of employment were altered during 1995. Hence, I have concluded that for those vessels at issue (Exhibit A-6), it was intended that the words used in clause 25.01 mean "prepared" meals and "maintained" quarters and this, even though the words "prepared" and "maintained" were not used in clause 25.01and thus that the grievor was entitled, under the collective agreement, to have his quarters maintained daily which was the practice.

In the alternative, I have concluded that by its own words at the bargaining table and its conduct for the following five years, the employer has reaffirmed the practice and hence was prohibited from altering the practice without the bargaining agent's consent.

The testimony given by the grievor's witnesses was clear and unambiguous whereas the recollection of the employer's witnesses on what occurred at the bargaining table was vague and imprecise. This coupled with the fact that the practice continued for five years after the negotiations renders the grievor's witnesses' version of the events consistent with their allegation that assurances were given at the bargaining table that the state of affairs which had existed under previous collective agreements would continue.

It is on the basis of these assurances that the bargaining agent decided to withdraw proposal 22. It did so to its own detriment as by relying on the employer's assurances, it relinquished its right to further pursue the re-wording of clause 25.01 and if necessary, to bring the matter to mediation and arbitration.

For these reasons, the grievance is granted. The employer is ordered to restore on those vessels where the practice existed prior to the issuance of the circular [Exhibit A-3] in 1996, the same practice as that which existed at the time.prior to the

issuance of the circular in 1996. Since the grievor does not mention "prepared meals" in the corrective action requested in his grievance, I am assuming that he was not denied "prepared meals" and hence, make no order relating to "meals" although I would have been prepared to do so, had evidence been produced that he was not served meals. The employer is ordered to restore the practice until the parties otherwise agree.

Marguerite-Marie Galipeau,
Deputy Chairperson

OTTAWA, July 18, 1997.